1998

Daryl W. Hennick v. Susan Greene : Brief of Appellee

Utah Court of Appeals

Don S. Redd; Attorney for Defendant/Appellant.
H. Russell Hetttinger; Attorney for Petitioner/Appellee.

IN THE UTAH COURT OF APPEALS

DARYL W. HENNICK

Petitioner and Appellee,

vs.

SUSAN GREENE,

Respondent and Appellant.

Civil No. 900000140 DA
(First Judicial District Court)

Case No. 981471-CA
(Utah Court of Appeals)

Priority No. 15

BRIEF OF THE APPELLEE

Appeal from the First Judicial District Court

of Cache County, State of Utah,

Honorable Clint S. Judkins, District Court Judge

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	)	(First Judicial District Court)
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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction of this matter pursuant to U.C.A. § 78-2a-3(h).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Brief of the Appellant identifies two issues for review:

1. Was the trial Court correct in disregarding respondent's Memorandum which was mailed within the time allowed by the Court.

2. Was the trial Court correct in denying respondent's Objection to Memorandum Decision.

Brief of Appellant at 5.

With regard to the first issue, petitioner asserts that the issue is more properly framed as follows:

> Was the trial Court correct in disregarding respondent's Memorandum which was mailed, but not filed, within the time allowed by the Court.

With regard to the second issue, petitioner asserts that since the "Order (1) Granting Petitioner's Objection to Respondent's Memorandum in Support of Objection to Commissioner's Ruling; and (2) Denying Respondent's Objection to Memorandum Decision and Request for Trial *De Novo*," signed by the Court on May 5, 1998, provides specifically in the Order that "[r]espondent's objection is hereby denied and the Memorandum Decision entered by Commissioner Garner herein is hereby confirmed as

the order of this Court." (Record on Appeal 1269-1271, at 1270), the second issue to be reviewed should be stated more properly as follows:

> Was the trial Court correct in denying respondent's Objection to Memorandum Decision and confirming the Memorandum Decision entered by Commissioner Garner.

STANDARD OF REVIEW

The first issue identified for review, i.e., whether the trial court was correct in disregarding respondent's Memorandum which was not filed within the ten day time limit allowed by the order of Judge Judkins made in open court and in the presence counsel for respondent (Record on Appeal at 1069-1070), is a decision which is committed to the sound discretion of a trial judge and accordingly, the standard of review is whether the action of the trial judge in striking respondent's memorandum and refusing to consider it was an abuse of discretion on the part of the trial judge. Harper v. Summit County, 963 P.2d 768 (Utah Ct. App. 1998); Birth Hope Adoption Agency, Inc. v.Doe, 947 P.2d 859, 190 Ariz. 285 (Ariz. App. Div. 1, 1997); Mason v. Householder, 647 P.2d 980, 58 Or. App. 192 (1982).

The second issue identified for review, i.e., whether the trial court was correct in denying respondent's Objection to Memorandum Decision and confirming the Memorandum Decision entered by Commissioner Garner, is to be reviewed pursuant to a mixed standard. In Utah, a divorce decree is to be interpreted according to established rules of contract interpretation. Taylor v. Hansen, 958 P.2d 923, 928 (Utah Ct. App.

1998). The Court , in the Memorandum Decision of Commissioner Garner, confirmed by Judge Judkins, found paragraph 4A(2)d of the Decree of Divorce to be susceptible to the interpretation argued for by each of the parties, or, as commonly stated, to be ambiguous. *See,* Record on Appeal 945-951, at 950. The determination by a court that a contract is ambiguous is a threshhold question of law which is reviewed on a "correctness" standard. R&R Energies v. Mother Earth Industries, Inc., 936 P.2d 1068 (Utah 1997); Interwest Construction v. Palmer, 923 P.2d 1350 (Utah 1996); Trolley Square Associates v. Nielson, 886 P.2d 61(Utah Ct. App. 1994). After considering the extrinsic evidence produced by both parties at the evidentiary hearing on this matter, the Court ruled in favor of the interpretation argued for and presented by petitioner. Since extrinsic evidence was received and considered by the Court in determining the proper interpretation of paragraph 4A2(d), the correct standard for review is whether the findings of the trial court, based upon the extrinsic evidence it considered, were clearly erroneous. Interwest Construction v. Palmer, *supra*; Hall v Process Instruments, 890 P.2d 1024 (Utah 1995); Trolley Square Associates v. Nielson, supra; Beesley v. Harris, 883 P.2d 1343 (Utah 1994).

The cases cited by respondent in support of a "correctness" standard as the appropriate standard of review for all issues identified in this appeal are cases where the trial court had granted summary judgment. (Brief of Appellant at 5). These cases do not have any bearing on the legal and factual situations being reviewed in this case.

STATEMENT OF DETERMINATIVE OR IMPORTANT CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

The petitioner has identified the following statutes and rules of central importance, which are cited in this Brief:

Utah Code Annotated § 78-7-5(4)

Utah Code Annotated § 78-7-17(3)

Rule 5(e), Utah Rules of Civil Procedure

Rule 61, Utah Rules of Civil Procedure

Rule 6-401, Utah Code of Judicial Administration

Rule 4-501, Utah Code of Judicial Administration

Rule 24, Utah Rules of Appellate Procedure

Rule 33, Utah Rules of Appellate Procedure

The full text of these rules is set forth in the Addendum

STATEMENT OF THE CASE

Petitioner/Appellee, Daryl W. Hennick (as a result of the change in the designations for parties in divorce proceedings to "petitioner" and "respondent" effective July 1, 1997, hereinafter referred to as "petitioner"), respectfully submits the following Statement of the Case:

1. On or about February 27, 1990, pursuant to a written stipulation signed by both parties (Record on Appeal at 08-14), the trial court entered a Decree of Divorce

terminating the marriage between petitioner and respondent. Said Decree of Divorce was final upon entry. (Record on Appeal at 49-54).

2. On or about March 8, 1990, respondent, by and through her counsel of record at that time, Stephen W. Jewell, filed a Motion to Set Aside Decree of Divorce (hereinafter referred to as "Respondent's First Motion to Set Aside)(Record on Appeal at 65-66, 67-75).

3. On or about August 31, 1980, the parties executed and filed a Stipulation for Partial Resolution of Motion to Set Aside Decree of Divorce and for Entry of Amended Decree of Divorce (Record on Appeal at 100-110).

4. Pursuant to the Stipulation for Partial Resolution of Motion to Set Aside Decree of Divorce and for Entry of Amended Decree of Divorce, on or about August 31, 1990, the Court signed and entered an Amended Decree of Divorce, which resolved by stipulation all of the financial issues between the parties, but reserved for future determination all custody and visitation issues (Record on Appeal at 174-183).

5. On or about September 12, 1990, Stephen W. Jewell filed his Notice of Withdrawal as counsel for respondent. (Record on Appeal at 194).

6. On or about September 17, 1990, J. Bruce Reading, filed his Appearance of Counsel, entering his appearance as counsel for respondent (Record on Appeal at 131-132).

7. On or about November 26, 1990, the parties executed and filed a

Stipulation for Final Resolution of Motion to Set Aside Decree of Divorce and for Entry of Second Amended Decree of Divorce, which completely and finally resolved respondent's pending Motion to Set Aside Decree of Divorce (Record on Appeal at 195-203).

8. On or about November 26, 1990, a Second Amended Decree of Divorce (hereinafter "the Decree") was entered pursuant to the written stipulation of the parties, which incorporated all of the financial terms which were agreed upon by the parties and reflected in the Amended Decree of Divorce, and which awarded petitioner sole custody of all of the minor children of the parties and specifically described respondent's visitation rights, all as voluntarily agreed to by the parties in their written stipulation (Record on Appeal at 232-243).

9. Between November 26, 1990 and August 27, 1992, various proceedings were held in this case, including, but not limited to, respondent's Order to Show Cause and Declaration in re Contempt (Record on Appeal at 254-255), petitioner's Order to Show Cause (Record on Appeal at 325-328), respondent's Petition to Modify Decree of Divorce and Motion for Order to Show Cause (Record on Appeal at 364) and Plaintiff's Motion to Dismiss Defendant's Petition to Modify Decree of Divorce (Record on Appeal at 372-374).

10. On or about August 27, 1992, J. Bruce Reading filed his Withdrawal of Counsel, giving notice that he was withdrawing as counsel for respondent and that her

file had been turned over to Steven Kuhnhausen, Esq. (Record on Appeal at 413-414).

11. On or about September 10, 1992, Steven Kuhnhausen filed his Substitution of Counsel giving notice that he would be representing respondent in all proceedings in this matter (Record on Appeal at 415-416).

12. On or about November 2, 1992, Steven Kuhnhausen filed his Withdrawal of Counsel (Record on Appeal at 417).

13. On or about December 3, 1992, Steven Kuhnhausen again filed an Appearance of Counsel, indicating that he would "represent the above-named defendant in all matters connected with the above entitled case."(Record on Appeal at 418-419).

14. On or about October 23, 1996, respondent filed an Order to Show Cause (hereinafter "respondent's OSC"), seeking, *inter alia*, judgment against petitioner for his alleged failure to pay additional interest and principal allegedly due pursuant to paragraph 4A(2)d of the Second Amended Decree of Divorce (Record on Appeal at 695-697).

15. On July 3, 1997, as a result of granting a motion filed by petitioner (Record on Appeal at 704-709), the First Judicial District Court, the Honorable Daniel W. Garner, Domestic Relations Commissioner, presiding, conducted an evidentiary hearing with regard to respondent's OSC. At the conclusion of the evidentiary hearing, Commissioner Garner allowed each of the partied to file supplemental written memoranda, if they so desired, within ten days after that hearing (Record on Appeal at 862).

16. On or about July 14, 1997, respondent filed her "Memorandum of Authorities and Law" dated July 14, 1997 (Record on Appeal at 952-960).

17. On or about July 14, 1997, petitioner filed his "Supplemental Memorandum of Points and Authorities Relating to the Hearing on Respondent's Order to Show Cause dated October 23, 1996." (Record on Appeal at 879-895)

18. On or about July 22, 1997, petitioner filed his "Memorandum in Response to Respondent's Order to Show Cause dated October 23, 1996." (Record on Appeal at 927-943)

19. On or about August 28, 1997, the Court issued its Memorandum Decision (Record on Appeal at 945-951).

20. On or about September 12, 1997, respondent, by and through her counsel of record, Don S. Redd, filed her "Objection to Memorandum Decision and Request for Trial de Novo" (hereinafter "the Objection")(Record on Appeal at 961-963).

21. On or about September 25, 1997, petitioner filed his "Motion to Dismiss Respondent's Objection to Memorandum Decision and Request for Trial do Novo (dated September 12, 1997)" (hereinafter "petitioner's Motion to Dismiss") and his "Memorandum in Support of Petitioner's Motion to Dismiss Respondent's Objection to Memorandum Decision and Request for Trial de Novo (dated September 12, 1997)", alleging and arguing that in filing the Objection, respondent had failed to comply with the requirements of Rules 6-401(4), 6-401(5) and 4-501(a) of the Utah Code of Judicial

Administration, in that the Objection did not identify the "specific recommendations" on which respondent was objecting (Rule 6-401(4)), did not "set forth reasons for each objection"(Rule 6-401(4)) and did not submit a written memorandum in support of the Objection (Rules 6-401(5) and 4-501(a))(Record on Appeal at 964-966, 967-981).

22. In response to the filing of petitioner's Motion to Dismiss, respondent, more than seventeen (17) days after filing the Objection and without seeking leave of court, respondent filed her "Memorandum in Support of Objection to Recommendation" (hereinafter "respondent's Memorandum"), dated September 29, 1997 (Record on Appeal at 984-985).

23. On December 12, 1997, a hearing on petitioner's Motion to Dismiss was held before the Honorable Clint S,. Judkins, at which time the Judge ruled in open court and in the presence of counsel for respondent that he would not allow a trial *de novo* with regard to respondent's Objection, that he would deny petitioner's Motion to Dismiss at that time, that respondent's Memorandum did not comply with the requirements of Rules 6-401(4), 6-401(5) and 4-501 and that he would enlarge the time for filing by respondent of an amended memorandum which complied with the requirements of the applicable rules. Respondent was allowed ten (10) days from the date of the hearing within to file, if she chose to do so, an amended memorandum (Record on Appeal at 1069-1070, 1135-1138).

24. On December 24, 1997, respondent filed her Memorandum in Support of

Objection to Commissioner's Ruling (hereinafter "respondent's Amended Memorandum"), which was twelve (12) days after the hearing before Judge Judkins and after the deadline which he had imposed for the filing of an amended memorandum (Record on Appeal at 1076-1084).

25. On or about January 5, 1998, petitioner filed "Petitioner's Objection to (1) Respondent's Memorandum in Support of Objection to Commissioner's Ruling, and (2) Affidavit o Stephen Jewell", arguing that respondent had not filed her Amended Memorandum within the time frame ordered by Judge Judkins (Record on Appeal at 1085-1096).

26. On April 21, 1998, pursuant to notice, Judge Judkins held a hearing on "Petitioner's Objection to (1) Respondent's Memorandum in Support of Objection to Commissioner's Ruling, and (2) Affidavit of Stephen Jewell", and on respondent's original Objection, dated September 12, 1997 (Record on Appeal at 1148).

27. After reviewing the written submissions of the parties, and hearing the arguments of counsel which were presented at the hearing on April 21, 1998, Judge Judkins entered an Order, which was signed on May 5, 1998, striking respondent's Amended Memorandum because it was untimely filed, denying the Objection dated September 12, 1997, and confirming the ruling reflected in the Memorandum Decision entered by Commissioner Garner as the order of the Court.(Record on Appeal at 1148, 1266-1268).

28. On or about June 3, 1998, respondent filed her Notice of Appeal (Record on Appeal at 1272).

Since respondent has not challenged any of the Findings of Fact made by Commissioner Garner and has not presented any legal arguments against the interpretation of paragraph 4A(2)d of the Decree of Divorce, petitioner has elected to not set forth any additional facts which were elicited at the evidentiary hearing.

MOTION FOR DAMAGES PURSUANT TO RULE 33, UTAH RULES OF APPELLATE PROCEDURE

Petitioner respectfully moves this Court, pursuant to Rule 33(c)(1), Utah Rules of Appellate Procedure (hereinafter "U.R.A.P."), for an award of damages, including an award to petitioner of single or double costs, as defined by Rule 34, U.R.A.P., and/or reasonable attorneys fees.

This motion is based upon the Record on Appeal, the Brief of the Appellant and the Brief of Appellee, including, but not limited to, point of the Argument set forth hereinafter, which, *inter alia*, reflect the following grounds for granting this motion:

1. Respondent admits failing to comply with the Order of Judge Judkins requiring respondent to file an amended memorandum in support of her Objection within ten (10) days after the hearing held on December 12, 1997;

2. Judge Judkins entered this Order after having found that respondent's original Objection and the untimely Memorandum filed in support of the Objection did not comply with the requirements of Rule 6-401(4) and 6-401(5);

3. Rule 5(e), Utah Rules of Civil Procedure, defines the filing of documents as "filing them with the clerk of the court".

4. Respondent has cited no authority or other support for the proposition that Judge Judkins misinterpreted Rule 5(e) or abused his discretion in enforcing his prior order by striking and disregarding respondent's Amended Memorandum.

5. Respondent did not order a transcript or designate any part of the record from the trial court to be provided in support of this appeal.

6. Respondent has not marshaled any evidence or identified any legal authorities which suggest that the interpretation by Commissioner Garner, as confirmed by Judge Judkins, of paragraph 4A(2)d of the Second Amended Decree of Divorce was incorrect.

7. The minimal argument presented by respondent does not cite in support of her position any relevant legal authority or contain any citations to the Record on Appeal.

SUMMARY OF ARGUMENT

Point I - Judge Judkins appropriately determined that respondent's failure to identify specific objections to the Memorandum Decision of Commissioner Garner, combined with her failure to file a supporting memorandum was not in compliance with Rule 6-401(4) and 6-401(5), U.C.J.A. After Judge Judkins gave respondent a second chance to get it right and respondent failed to file her Amended Memorandum by the

deadline imposed by court order, he was justified in striking and disregarding her Amended Memorandum. Respondent has failed to provide this Court with any factual or legal support for the proposition that Judge Judkins erred and absent a showing of an abuse of discretion, this Court should affirm the order striking respondent's Amended Memorandum.

Point II - Respondent has failed to brief the second issue identified in respondent's statement of Issues Presented for Review and as a result of this failure by respondent, this Court should not consider this issue.

Point III - Respondent's brief and this appeal are both frivolous within the meaning of Rule 33(a) and 33(b), U.R.A.P., in that respondent has failed to present any relevant and appropriate support for its assertions of error and has filed a brief which is deficient and noncompliant. As a result, petitioner should be awarded damages pursuant to Rule 33, U.R.A.P.

ARGUMENT

POINT I

THE TRIAL COURT CLEARLY ACTED WITHIN ITS DISCRETION IN STRIKING AND DISREGARDING RESPONDENT'S MEMORANDUM IN SUPPORT OF HER OBJECTION TO MEMORANDUM DECISION

Respondent argues that Judge Judkins acted improperly in striking respondent's Memorandum in Support of Objection to Commissioner's Ruling, which was filed with the Court on December 24, 1997 (Brief of Appellant at pages 7-9). Respondent further

argues that Rule 61, Utah Rules of Civil Procedure (hereinafter "U.R.C.P."), requires that the Court overlook any minor defects in the presentation of her case to the Court and that to do otherwise would deny to respondent rights guaranteed to her by the constitutions of the State of Utah and the United States of America. Unfortunately, respondent's argument is misguided legally and factually.

The objection to Memorandum Decision and Request for Trial De Novo, which was filed by respondent on or about September 12, 1997, did not comply with the requirements of Rules 6-401(4), 6-401(5) and 4-501(a) of the Utah Code of Judicial Administration (hereinafter "U.C.J.A."). These rules provide specific time and substance requirements for objections to the recommendations of domestic relations commissioners. Rule 6-401(4), U.C.J.A., provides as follows:

> Any party objecting to the recommendation order shall file a written objection to the recommendation with the clerk of the Court an serve copies on the Commissioner's office and opposing counsel. Objections shall be filed within ten (10) days of the date the Recommendation was made in open court, or if taken under advisement, ten (10) days after the date of the subsequent written recommendation made by the Commission. Objections shall be to specific recommendations and shall set forth reasons for each objection. (Emphasis supplied).

In addition, Rule 6-401(5), U.C. J. A., clearly identifies the procedure and standard for judicial review of objections to commissioner's recommendations which may be filed. It states:

> Cases not resolved at the settlement or pre-trial conference shall be set for trial on all issues not resolved. All other matters shall be reviewed in accordance with Rule 4-501. (Emphasis supplied).

Respondent's Objection to Memorandum Decision and Request for Trial De Novo, dated September 12, 1997, did not comply with the requirements of Rules 6-401(4), 6-401(5) and 4-501(1)(a) for the following reasons:

1. It did not state objections to specific recommendations;

2. It did not set forth any reasons for the general objection, let alone any reasons for specific objections as required by 6-401(4);

3. Rule 4-501 governs the procedure for filing and documenting of an objection to a recommendation for a commissioner. It clearly requires that a memorandum be filed. Respondent failed to file any memorandum at all with her Objection dated September 12, 1997. On September 29, 1997, respondent did file a Memorandum, but this was only after petitioner filed his Motion to Dismiss alleging failure by respondent to file a memorandum as a reason why respondent's Objection should be dismissed.

At the hearing held before on December 12, 1997, Judge Judkins denied petitioner's Motion to Dismiss respondent's Objection, but ruled that respondent's belated Memorandum dated September 29, 1997, did not comply with the requirements of Rules 6-401(4), 6-401(5) and 4-501(1)(a), U.C. J. A., and gave respondent another chance to get it right. However, respondent failed to file her Amended Memorandum within the ten (10) day time frame ordered by Judge Judkins. See Rule 5(e) Utah Rules of Civil Procedure (mailing does not constitute filing). Accordingly, Judge Judkins was

correct in his ruling that respondent had never complied with the requirements of his Order of December 12, 1997, or with the plain and specific requirements of Rules 6-401(4), 6-401(5) and 4-501(1)(a), U.C.J.A.

As the record clearly reflects, Judge Judkins gave respondent an abundant opportunity to file appropriate documents in support of her Objection to the Memorandum Decision of Commissioner Garner. Although Judge Judkins found that respondent had not complied with the requirements of Rule 6-401(4) and 6-401(5), U.C.J.A., at the hearing held on December 12, 1997, rather than dismiss the objection as requested by petitioner, he allowed respondent an additional ten (10) days to file a compliant memorandum. (Record on Appeal at 1135-1138). It was only after respondent failed to file his revised Memorandum within the ten day period that he declined to consider it. (Record on Appeal at 1148, 1266-1268). It is clearly within the authority and power of the Court to establish deadlines and to enforce its own orders with appropriate sanctions. U.C.A. §§ 78-7-5(4) and 78-7-17(3). In Barnard v. Wasserman, 855 P.2d 243 (Utah 1993), it was held that the power of a court to enforce its rules implies the existence of a mechanism for enforcement. *See also,* State, In re M.S., 781 P.2d 1287 (Utah Ct. App. 1987); Isaacson v. Dorious, 669 P.2d 849 (Utah 1983). One of the most common realities in legal procedure is that rules and court orders frequently impose deadlines and that consequences flow from the failure to meet those deadlines. Respondent has not pointed to any facts which suggest that Judge Judkins, after allowing respondent a second chance

to comply with the rules governing the filing of an objection to the recommendation of a domestic relations commissioner, was abusing his discretion in striking and disregarding the memorandum which respondent had filed untimely.

Respondent's reliance upon Rule 61, U.R.C.P. is misplaced. Rule 61 does not reflect an admonition to the trial court to ignore its own orders, but rather it is a direction to the reviewing court to consider upon review only errors made by the trial court which had a substantial impact on the outcome of the case. 11Wright & Miller §2881 at 441-443. *See,* Price v. Armour, 949 P.2d 1251 (Utah 1997). Contrary to respondent's assertions, she had her day in court, including a complete evidentiary hearing where she testified, called third party witnesses, cross examined petitioner, submitted exhibits and presented oral argument. In addition, Commissioner Garner allowed the submission of supplemental memoranda. However, because respondent failed to file a compliant memorandum when she filed her Objection on September 12, 1997, and because she failed to abide by the specific order of the Court with regard to the deadline for filing her Amended Memorandum, she lost her opportunity to have her written arguments considered by the Court. Similar rules exist with regard to the filing and content of appellate briefs. *See, inter alia,* Rule 4(a), Rule 9(g), Rule 24(i), Rule 26(c) and Rule 27(d), U.R.A.P. Clearly, this type of ruling is within the sound discretion of the Court, and absent any showing by respondent of any facts suggesting that the Court abused its discretion, the action of Judge Judkins in striking and disregarding respondent's

Memorandum should not be overturned by this Court.

POINT II

RESPONDENT HAS NOT BRIEFED THE SECOND ISSUE IDENTIFIED FOR REVIEW AND THIS COURT SHOULD NOT CONSIDER IT ON APPEAL

Respondent's brief does not marshal any facts, cite any relevant legal authorities, make any legal arguments or otherwise provide any support for the second issue identified in respondent's statement of the Issues Presented for Review, i.e., the contention that Judge Judkins erred in denying respondent's Objection to Commissioner Garner's Memorandum Decision, and in confirming the Memorandum Decision as the order of the Court. The argument set forth in the Brief of Appellant focuses solely on whether Judge Judkins acted improperly in striking respondent's Amended Memorandum. Even though an issue may be mentioned in a brief, that issue will not be addressed by an appellate court if it has not been briefed. Marshall v. Marshall, 915 P.2d 508, 515 (Utah Ct.App. 1996); Burns v. Summerhays, 927 P.2d 197 (Utah Ct. App. 1996); State ex rel C.Y. v. Yates, 834 P.2d 599 (Utah Ct. App. 1992); State v. Horton, 848 P.2d 708 (Utah Ct. App.), *cert.* denied, 857 P.2d 948 (Utah 1993). Undoubtedly, one of the reasons for this rule is, as in this case, where factual and legal arguments are not articulated in the brief with appropriate citation to authorities and to the record on appeal, it is impossible for the opposing party to respond or for the Court to render a decision. Accordingly, this Court should not consider on appeal the second issue identified in the

statement of Issues Presented for Review.

POINT III

RESPONDENT'S APPEAL IS FRIVOLOUS WITHIN THE MEANING OF RULE 33 OF THE UTAH RULES OF APPELLATE PROCEDURE

Rule 33(a), U.R.A.P., provides as follows:

> . . . if the Court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined by Rule 34, and/or reasonable attorneys fees, to the prevailing party.

Rule 33(b), U.R.A.P., then defines what constitutes a "frivolous" act within the meaning of Rule 33(a), as follows:

> For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law.

Although this rule is to be applied only in egregious cases, Porco v. Porco, 752 P.2d 365 (Utah Ct. App. 1988), this rule has been applied by this Court in several cases. *See,* Maughan v. Maughan, 770 P.2d 156 (Utah Ct. App. 1989); Porco v. Porco, supra; Backstrom Family Ltd. Partnership v. Hall, 751 P.2d 1157 (Utah Ct. App. 1988); O'Brien v. Rush, 744 P.2d 306 (Utah Ct. App. 1987); Eames v. Eames, 735 P.2d 395 (Utah Ct. App. 1987). It is not necessary to show that there was a lack of good faith on the part of the filer of the appeal or brief. O'Brien v. Rush, supra.

In Eames v. Eames, supra, it was held that where an appeal was taken from an

order distributing property and awarding alimony in a divorce case, and the appellant mischaracterized and misstated the facts and the law governing the issues in the case, and it was determined that there was no basis for the argument presented by the appellant, the appeal was "frivolous". In this case, similar circumstances exist. Respondent filed an appeal which allegedly was seeking review of two issues: (1) whether the trial court erred in striking her Amended Memorandum, which was filed after the deadline imposed by specific court order; and (2) whether the trial court erred in denying her Objection to Commissioner Garner's Memorandum Decision and confirming the Memorandum Decision as the order of the court. However, respondent did not request a transcript or designate the record as required by Rule 11, U.R.A.P. Respondent did file a brief, but the brief is noncompliant and deficient in at least the following significant respects:

1. Respondent's Statement of the Case does not include any citations to the record and is filled with unsupported, inaccurate, immaterial, emotional and scandalous assertions and statements. *See,* Rule 24(a)(7), Rule 24(e) and Rule 24(i), U.R.A.P.

2. Respondent's Brief does not contain a Summary of Argument. *See,* Rule 24(a)(8), U.R.A.P.

3. The Argument set forth in Respondent's Brief does not include any citations to the record. *See,* Rule 24(a)(9), U.R.A.P.

4. The Argument set forth in Respondent's Brief does not include any factual or legal arguments whatsoever with regard to the second issue identified in

respondent's statement of the Issues Presented for Review, i.e., whether the trial court erred in denying respondent's Objection and in confirming the Memorandum Decision of Commissioner Garner as the order of the Court.

5. The Argument set forth in Respondent's Brief does address the propriety of the ruling of Judge Judkins striking and disregarding respondent's Amended Memorandum. However, this argument fails to make any citations to the record and marshal any facts in support of her position. The only legal authorities cited by respondent in support of her contention that Judge Judkins erred are Rule 61, U.R.C.P., Utah Sand & Gravel Products Corp. v. Tolbert, 402 P.2d 407, 16 Utah 2d 407 (Utah 1987), and various provisions of the constitutions of Utah and the United States. However, as set forth above, these authorities have no application to the facts and legal circumstances of this case and respondent's reliance upon and assertion of them flies in the face of common sense.

Accordingly, this Court should determine that this appeal and the Brief of Appellant are both frivolous because respondent has not presented any appropriate and relevant legal or factual basis for her assertions that the court erred and because the arguments presented are not supported by any facts, have not been supported by the citation of existing statutes, rules or case law, and no effort has been made to make a good faith argument for the extension, modification or reversal of existing law.

CONCLUSION

Judge Judkins, after patiently allowing respondent a second opportunity to comply with the requirements for filing an objection to the recommendation of Commissioner Garner was entirely justified in striking respondent's Amended Memorandum and in ruling on the merits of the Objection by confirming the Memorandum Decision of Commissioner Garner. As indicated above, none of the facts relating to Judge Judkins procedural ruling are contested by respondent and her legal arguments are inapplicable. Further, respondent has failed to make any argument whatsoever with regard to her assertion the Judge Judkins erred in denying her Objection and in confirming the Memorandum Decision of Commissioner Garner as the order of the trial court. Accordingly, this Court should sustain the ruling of the trial court in all respects, determine that respondent's Appeal and her brief are frivolous, and award petitioner his costs and attorneys fees pursuant to Rule 33 and 34, U.R.A.P.

Respectfully submitted.

Dated: March 22, 1999

H. Russell Hettinger

H. Russell Hettinger
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the Brief of the Appellee were mailed, postage prepaid, on this 22nd day of March, 1999, to the following:

Don S. Redd, Esq.
Attorney for Appellant and Respondent
44 North Main Street
Layton, Utah 84041

H. Russell Heftinger

ADDENDUM

78-7-5. Powers of every court.

Every court has authority to:

(1) preserve and enforce order in its immediate presence;

(2) enforce order in the proceedings before it, or before a person authorized to conduct a judicial investigation under its authority;

(3) provide for the orderly conduct of proceedings before it or its officers;

(4) compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in a pending action or proceeding;

(5) control in furtherance of justice the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it in every matter;

(6) compel the attendance of persons to testify in a pending action or proceeding, as provided by law;

(7) administer oaths in a pending action or proceeding, and in all other cases where necessary in the exercise of its authority and duties;

(8) amend and control its process and orders to conform to law and justice;

(9) devise and make new process and forms of proceedings, consistent with law, necessary to carry into effect its authority and jurisdiction; and

(10) enforce rules of the Supreme Court and Judicial Council.

78-7-17. Powers of every judicial officer.

Every judicial officer has power:

(1) to preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty;

(2) to compel obedience to his lawful orders as provided by law;

(3) to compel the attendance of persons to testify in a proceeding before him in the cases and manner provided by law;

(4) to administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties.

Rule 5. Service and filing of pleadings and other papers.

(a) *Service: When required.*

(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

(2) No service need be made on parties in default for failure to appear except as provided in Rule 55(a)(2) (default proceedings). Pleadings asserting new or additional claims for relief against a party in default shall be served in the manner provided for service of summons in Rule 4.

(3) In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) *Service: How made and by whom.*

(1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy or by mailing a copy to the last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at the person's office with a clerk or person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(2) Unless otherwise directed by the court:

(A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;

(B) every other pleading or paper required by this rule to be served shall be served by the party preparing it; and

(C) an order or judgment prepared by the court shall be served by the court.

(c) *Service: Numerous defendants.* In any action in which there is an unusually large number of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) *Filing.* Except where rules of judicial administration prohibit the filing of discovery requests and responses, all papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service. The papers shall be accompanied by a certificate of service showing the date and manner of service completed by the person effecting service.

(e) *Filing with the court defined.* The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may accept the papers, note thereon the filing date and forthwith transmit them to the office of the clerk.

(Amended effective September 4, 1985; January 1, 1987; November 1, 1997.)

Rule 61. Harmless error.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 4-501. Motions.

Intent:

To establish a uniform procedure for filing motions, supporting memoranda and documents with the court.

To establish a uniform procedure for requesting and scheduling hearings on dispositive motions.

To establish a procedure for expedited dispositions.

Applicability:

This rule shall apply to motion practice in all district courts except proceedings before the court commissioners and small claims cases. This rule does not apply to petitions for habeas corpus or other forms of extraordinary relief.

Statement of the Rule:

(1) *Filing and service of motions and memoranda.*

(A) *Motion and supporting memoranda.* All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(B) *Memorandum in opposition to motion.* The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(d) of this rule.

(C) *Reply memorandum.* The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

(D) *Notice to submit for decision.* Upon the expiration of the five-day period to file a reply memorandum, either party may notify the Clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

(2) *Motions for summary judgment.*

(A) *Memorandum in support of a motion.* The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(B) *Memorandum in opposition to a motion.* The points and authorities in opposition to a motion for summary judgment shall begin with a section that

contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(3) *Hearings.*

(A) A decision on a motion shall be rendered without a hearing unless ordered by the Court, or requested by the parties as provided in paragraphs (3)(b) or (4) below.

(B) In cases where the granting or a motion would dispose of the action or any issues in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

(C) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

(D) When a request for hearing is denied, the court shall notify the requesting party. When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

(E) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(F) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

(G) All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the Court.

(4) *Expedited dispositions.* Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily.

(5) *Telephone conference.* The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

(Amended effective January 15, 1990; April 15, 1991; November 1, 1996.)

Rule 6-401. Domestic relations commissioners.

Intent:

To identify the types of cases and matters which commissioners are authorized to hear, to identify the types of relief which commissioners may recommend and to identify the types of final orders which may be issued by commissioners.

To establish a procedure for judicial review of commissioners' decisions.

Applicability:

This rule shall govern all domestic relations court commissioners serving in the District Courts.

Statement of the Rule:

(1) *Types of cases and matters.* All domestic relations matters filed in the district court in counties where court commissioners are appointed and serving, including all divorce, annulment, paternity and spouse abuse matters, orders to show cause, scheduling and settlement conferences, petitions to modify divorce decrees, scheduling conferences, and all other applications for relief, shall be referred to the commissioner upon filing with the clerk of the court unless otherwise ordered by the Presiding Judge of the District.

(2) *Authority of court commissioner.* Court commissioners shall have the following authority:

(A) Upon notice, require the personal appearance of parties and their counsel;

(B) Require the filing of financial disclosure statements and proposed settlement forms by the parties;

(C) Obtain child custody evaluations from the Division of Family Services pursuant to Utah Code Ann. Section 62A-4-106, or through the private sector;

(D) Make recommendations to the court regarding any issue, including a recommendation for entry of final judgment, in domestic relations or spouse abuse cases at any stage of the proceedings;

(E) Require counsel to file with the initial or responsive pleading, a certificate based upon the facts available at that time, stating whether there is a legal action pending or previously adjudicated in a district or juvenile court of any state regarding the minor child(ren) in the current case;

(F) At the commissioner's discretion, and after notice to all parties or their counsel, conduct evidentiary hearings consistent with paragraph (3)(C) below;

(G) Impose sanctions against any party who fails to comply with the commissioner's requirements of attendance or production of discovery;

(H) Impose sanctions against any person who acts contemptuously under Utah Code Ann. Section 78-32-10;

(I) Issue temporary or ex parte orders;

(J) Conduct settlement conferences with the parties and their counsel for the purpose of facilitating settlement of any or all issues in a domestic relations case. Issues which cannot be agreed upon by the parties at the settlement conference shall be certified to the district court for trial; and

(K) Conduct pretrial conferences with the parties and their counsel on all domestic relations matters unless otherwise ordered by the presiding judge. The commissioner shall make recommendations on all issues under consideration at the pretrial and submit those recommendations to the district court.

(3) *Duties of court commissioner.* Under the general supervision of the presiding judge, the court commissioner has the following duties prior to any domestic matter being heard by the district court:

(A) Review all pleadings in each case;

(B) Certify those cases directly to the district court that appear to require a hearing before the district court judge;

(C) Except in cases previously certified to the district court, conduct hearings with parties and their counsel for the purpose of submitting recommendations to the parties and the court,

(D) Coordinate information with the juvenile court regarding previous or pending proceedings involving children of the parties, and

(E) Refer appropriate cases to mediation programs if available

(4) *Objections* With the exception of pre-trial orders, the commissioner's recommendation is the order of the court until modified by the court Any party objecting to the recommended order shall file a written objection to the recommendation with the clerk of the court and serve copies on the commissioner's office and opposing counsel Objections shall be filed within ten days of the date the recommendation was made in open court or if taken under advisement, ten days after the date of the subsequent written recommendation made by the commissioner Objections shall be to specific recommendations and shall set forth reasons for each objection

(5) *Judicial review.* Cases not resolved at the settlement or pretrial conference shall be set for trial on all issues not resolved All other matters shall be reviewed in accordance with Rule 4-501

(6) *Prohibitions*

(A) Commissioners shall not make final adjudications of domestic relations matters

(B) Commissioners shall not serve as pro tempore judges in any matter, except as provided by Rule of the Supreme Court.

(Amended effective January 15, 1990; April 15, 1991; November 15, 1995.)

Rule 24. Briefs.

(a) *Brief of the appellant* The brief of the appellant shall contain under appropriate headings and in the order indicated

(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties The list should be set out on a separate page which appears immediately inside the cover

(2) A table of contents, including the contents of the addendum, with page references

(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited

(4) A brief statement showing the jurisdiction of the appellate court

(5) A statement of the issues presented for review, including for each issue the standard of appellate review with supporting authority, and

(A) citation to the record showing that the issue was preserved in the trial court, or

(B) a statement of grounds for seeking review of an issue not preserved in the trial court

(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule

(7) A statement of the case The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below A statement of the facts relevant to the issues presented for review shall follow All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule

(8) Summary of arguments The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief It shall not be a mere repetition of the heading under which the argument is arranged

(9) An argument The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on

(10) A short conclusion stating the precise relief sought

(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick If the addendum is bound separately, the addendum shall contain a table of contents The addendum shall contain a copy of

(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief,

(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion, in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service, and

(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction

(b) *Brief of the appellee* The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include

(1) a statement of the issues or of the case unless the appellee is dissatisfied

(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) *Reply brief.* The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraph (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) *References in briefs to parties.* Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person,' "the taxpayer," etc.

(e) *References in briefs to the record.* References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) *Briefs in cases involving cross-appeals.* If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rule 26, unless the parties otherwise agree or the court otherwise orders. The brief of the appellant shall not exceed 50 pages in length. The brief of the appellee/cross-appellant shall contain the issues and arguments involved in the cross-appeal as well as the answer to the brief of the appellant and shall not exceed 50 pages in length. The appellant shall then file a brief which contains an answer to the original issues raised by the appellee/cross-appellant and a reply to the appellee's response to the issues raised in the appellant's opening brief. The appellant's second brief shall not exceed 25 pages in length. The appellee/cross-appellant may then file a second brief, not to exceed 25 pages in length, which contains only a reply to the appellant's answers to the original issues raised by the appellee/cross-appellant's first brief. The lengths specified by this rule are exclusive of table of contents, table of authorities, and addenda and may be exceeded only by permission of the court. The court shall grant reasonable requests, for good cause shown.

(g) *Briefs in cases involving multiple appellants or appellees.* In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(h) *Citation of supplemental authorities.* When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(i) *Requirements and sanctions.* All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) *Damages for delay or frivolous appeal.* Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) *Definitions.* For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) *Procedures.*

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.